United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1249
76-1271

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To be argued by
FEDERICO E. VIRELLA, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-1249, 76-1271

UNITED STATES OF AMERICA,
Appellee,

—v.—

DONALD HEAD, a k a "MR. DON," and
BRUCE WHEATON,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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[Corrected Copy]

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Preliminary Statement

Donald Head and Bruce Wheaton appeal from judgments of conviction entered on May 7, 1976 and May 11, 1976, respectively, in the Southern District of New York, following separate jury trials before the Honorable Lloyd F. MacMahon, United States District Judge.*

Indictment 76 Cr. 295, filed March 25, 1976, charged Donald Head, a/k/a "Mr. Don", Bruce Wheaton, Boonterm Petkamnerd, Boonsak Phuvasitkul, a/k/a "Sammy," Manop Saiphantong, and Perm Petkamnerd, in five counts

* The defendants were scheduled to be tried jointly beginning on May 3, 1976, but on that date Wheaton's attorney was ill. Judge MacMahon therefore severed the trial of Wheaton from that of his co-defendant. Wheaton's trial commenced on May 10, 1976, immediately following the conclusion of Head's trial.

with violations of the federal narcotics laws. The trials below were limited to Counts One, Four and Five.* Count One charged all six defendants with a conspiracy to manufacture heroin and import it into the United States, and to distribute the heroin in the United States, in violation of Title 21, United States Code, Sections 846 and 963. Count Four charged Head and Wheaton and the other defendants with the substantive offense of importing into the United States (New York, New York) from Bangkok, Thailand, approximately 638 grams of heroin on February 23, 1976, in violation of Title 21, United States Code, Sections 812, 951 and 952(a), and Title 18, United States Code, Section 2. Count Five charged Head and Wheaton and the others with distributing approximately 638 grams of heroin on February 23, 1976, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A), and Title 18, United States Code, Section 2.

Head's trial commenced on May 3, 1976 and concluded on May 7, 1976, when the jury returned guilty verdicts on the three counts. Wheaton's trial began on May 10, 1976, and on May 11, 1976 the jury returned guilty verdicts on all counts. On May 24, 1976, Head and Wheaton each were sentenced to three concurrent terms of imprisonment of fifteen years to be followed by three years special parole.**

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*Count Two charged Phuvasitkul with distributing 101 grams of heroin on April 18, 1975, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Count Three charged Saiphantong and the two Petkamnerds with manufacturing heroin in Thailand, intending that it be imported into the United States, in violation of Title 21, United States Code, Sections 812, 959, 960(a)(3) and 960(b)(1).

**Prior to trial, Phuvasitkul pled guilty to Counts Two and Five of the indictment, and thereafter testified on behalf of the Government. On July 27, 1976, Phuvasitkul was sentenced to concurrent terms of imprisonment of two years on each count, to be followed by three years special parole. Saiphantong and the two Petkamnerds remain fugitives, presumably in Thailand.

Both Head and Wheaton are currently serving their sentences.

Statement of Facts

The Government's Case

The Government's proof at trial revealed the inner workings of an international narcotics conspiracy that was responsible for smuggling large amounts of pure heroin from Bangkok, Thailand to the United States in the early part of 1976. The heroin was secreted in packages and mailed through the United States Air Force postal system from Bangkok to New York and other parts of the United States, and thereafter distributed.

The evidence at trial showed that Boonterm Petkamnerd, his brother Perm, and Manop Saiphantong were the suppliers of the heroin; that Donald Head, a Staff Sergeant with the United States Air Force assigned as a chief postal supervisor to the Don Muang Air Force Post Office in Bangkok, Thailand, was responsible for mailing the packages of heroin from Thailand to the United States; and that Boonsak Phuvasitkul, a Thai national, and Bruce Wheaton, an ex-Air Force serviceman, were the salesmen and distributors of the heroin in New York and other parts of the United States.

During the early part of September 1975, Boonsak Phuvasitkul ("Boonsak"), who was then living in Bangkok, Thailand, met with an old friend named Manop Saiphantong ("Manop") at Manop's home in Bangkok. Boonsak asked Manop if he knew anyone who could supply some heroin to be mailed to the United States. Manop told Boonsak that he would ask Boonterm Petkamnerd

("Boonterm"), whom Boonsak had known for six years (H.Tr. 150-53, GX 20A; W.Tr. 11-12, GX 20A).* At a later meeting in Boonsak's office in Bangkok, Manop told Boonsak that Boonterm had some merchandise, heroin, available and that he (Boonterm) knew some "colored guys" working at the United States Air Force Post Office who could mail it from Bangkok to New York (H.Tr. 153-54; W.Tr. 13-14). Subsequently, in the early part of December 1975, Boonsak met Manop, Boonterm and Perm Petkamnerd ("Perm") in a coffee shop in Bangkok, where Boonterm and/or Perm told Boonsak that they had someone at the air base who could mail a unit of the merchandise ** to Boonsak's customers in New York. Further, at this and another meeting in December 1975 or January 1976, Boonterm and the others advised Boonsak that the mailing had to be done by the early part of 1976 because the Negro man, named Don, who worked at the United States Air Force Post Office was scheduled to leave Thailand in the near future (H.Tr. 154-59, 161-63, 179-81; W.Tr. 14-16, 20-21).

During this period, Manop also told Boonsak that since 1973 or 1974 Boonterm had been living in Rayong, a province in Thailand where the American Air Force had a military base at Utapao, and that he knew a man named Bruce, who in turn had a friend named Don who could mail the heroin (W.Tr. 17-19).***

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* Page references to the official transcript of Head's trial are abbreviated "H.Tr.", and to the transcript of Wheaton's trial are abbreviated "W.Tr." Government Exhibits are referred to as "GX".

** Boonsak testified that a "unit" amounted to approximately 700 grams of heroin (H.Tr. 157; W.Tr. 16).

*** Wheaton had served with the United States Air Force at Utapao Air Force Base from about January 1972 to January 1973 (W.Tr. 119, GX 70).

In the latter part of January, 1976, Boonsak telephoned from Thailand a "Mr. Jack" in New York, and the two discussed the sale and mailing of a unit of heroin for a price of $35,000. Unknown to Boonsak, "Mr. Jack" was Jack Taylor, an undercover agent with the Drug Enforcement Administration (DEA), who was posing as a customer for Thai heroin.* In a subsequent telephone conversation, Boonsak told Jack that his people had someone in the Air Force post office who could mail the unit to New York (H.Tr. 164-78, 284-85, GX 50, 50A, 51, 51A; W.Tr. 22-23, 72-73, GX 50, 50A, 51, 51A).

On February 4, 1976, Boonsak was taken by Boonterm, Manop and Perm to an apartment located at Sukhumvit Road, Soi 13, in Bangkok, where Boonsak met Donald Head. Head agreed to mail a unit of heroin to New York and described the procedure he used in mailing heroin. Head explained that the heroin was packed in a plastic bag, which was then inserted in two or three additional plastic bags. Each bag was individually sprinkled with baby powder, and a towel wrapped around the bags. Head further explained that the baby powder prevented the inspection dogs from smelling the heroin, while the towel protected the heroin from detection on the X-ray machine in the post office.** Head told Boonterm that he wanted

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* This and thirteen other phone conversations between Boonsak and "Mr. Jack" or "Mr. John"—John Coleman, another DEA undercover agent—were recorded and introduced into evidence during both trials. Hereinafter, both Taylor and Coleman will be referred to as the "New York customers."

** Head worked at the air mail terminal at Don Muang Airport outside Bangkok beginning in 1974, and from January through March 1976, Head was the chief supervisor of Shift A, which according to a work schedule (GX 19) was on duty at the air mail terminal from February 13, 1976 through February 18, 1976. As chief supervisor of a shift, Head was responsible for the receiving, dispatching and inspecting of all incoming and outgoing mail. Specifically with respect to outgoing mail, Head was responsible for the fluoroscoping and inspection by dogs of all mail prior to packing the mail containers (H.Tr. 390-95, W.Tr. 109-12).

one free unit for himself for mailing Boonsak's package, and that he also wanted to purchase a unit from Boonterm (H.Tr. 184-92; W.Tr. 24-27).

Before leaving Head's apartment, Boonterm instructed Boonsak that when he (Boonsak) arrived in New York, he should visit Bruce Wheaton and tell Wheaton that Wheaton should send the $20,000 he owed Boonterm. At the same time, Boonterm gave Boonsak a slip of paper (GX 3) bearing Wheaton's address in the Bronx,* and a Thai identification card (GX 4) bearing a photograph of Boonterm, which Boonsak was instructed to show Wheaton (H.Tr. 192-99; W.Tr. 27-29).**

After leaving Head's apartment, Manop accompanied Boonsak to the latter's home. There, Manop gave Boonsak travel money and Boonsak gave Manop the "Louis Kramer Associate, Radio City Station" address where Head was to mail the heroin (H.Tr. 200, 209; W.Tr. 30-31).*** On February 8, 1976 (as indicated in his passport, GX 2), Boonsak traveled to the Philippine Islands to attempt to obtain a visa for entry into the United States. While there, he made various telephone calls to his New York customers concerning his problems in obtaining a visa

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* The address read "1048 E. 228 S.T., Bronx 10466 Newyork, U.S.A." Records of the New York State Department of Motor Vehicles show that Bruce Wheaton, in registering a 1974 automobile, gave as his address 1048 East 228 Street, Bronx, New York (W.Tr. 118-19, GX 70).

** Additionally, in Head's apartment Boonterm gave Manop 27,000 baht (Thai currency) which was to be used for paying Boonsak's traveling expenses (H.Tr. 198; W.Tr. 29).

*** The full address was "Louis Kramer Associates, Box 312 Radio City Station, New York, New York 10019." The postal box was in fact an undercover mail box rented by the DEA. Boonsak had received the address from the New York customers.

for entry into the United States. Additionally, Boonsak told his customers that the merchandise would be mailed by a serviceman through the Air Force post office to the Louis Kramer address. Subsequently, Boonsak telephoned Manop at the coffee shop in Bangkok and told Manop that the Louis Kramer address was good. Manop told Boonsak that he would give the address to Boonterm and that Head would mail the package soon (H.Tr. 201-09, 217, GX 20, 52, 52A, 53, 53A; W.Tr. 32-35, GX 20, 52, 52A, 53, 53A).

After the first telephone conversation to Manop from the Philippines, Boonsak engaged in a number of other phone conversations with the New York customers concerning the mailing of the package through the Air Force postal system. On February 16, 1976, Boonsak again telephoned Manop from the Philippines; Manop told him that Head had mailed the package to Louis Kramer in New York, and that the "sender" was a "Mary Baker" from Hawaii. Upon returning to Bangkok, Boonsak called New York and told the customers that the package had been mailed under the name of Mary Baker bearing the insurance number 387111 (H.Tr. 218-30, GX 54, 54A, 55, 55A, 56, 56A; W.Tr. 35-36, GX 54, 54A, 55, 55A).

On February 23, 1976, Andrew Fenrich, a Special Agent with the DEA, went to the Radio City Postal Station and picked up the package (GX 1A),* which he transported to the DEA laboratory. There, Edward Manning,

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* The package was addressed: "Louis Kramer, 635 CBSG Box 6415, APO S.F. 96330." All but "Louis Kramer" was crossed out and an additional address read "FWD to: Box 312, Radio City Station, N.Y., N.Y. 10019." The package bore insurance ticket number 378111. The return address read: "Mary A. Baker, 320 Waia Kamio, RD., L. Hi 96817." No individual named Louis Kramer has served with the United States Air Force since April

[Footnote continued on following page]

a chemist employed by the DEA, opened the package and took out pieces of newspaper and a towel wrapped around two triple-thick plastic bags covered with talcum powder. The last bag contained a white powder, which Manning analyzed as 638.88 grams of 100% pure heroin hydrochloride (H.Tr. 324-25, 333-43, GX 1, 1A, 1B, 1C, 1D, 1E; W.Tr. 115-16, GX 1, ID, GX 70).

During the days following February 23, 1976, Boonsak had a series of phone conversations with his New York "customers" wherein they confirmed that the package had arrived in New York. Additionally, they discussed possible ways for Boonsak to secure a visa and travel to New York to pick up the $35,000 payment for the unit. Boonsak also informed his customers that his people had three to four other units in San Francisco for sale (H.Tr. 230-41, GX 57, 57A, 58, 58A, 59, 59A, 60, 60A, 61, 61A, 62, 62A, 63, 63A; W.Tr. 37, GX 56, 56A, 63, 63A).

Finally, in the latter part of February, the New York customers sent Boonsak a cable (GX 5), a pre-paid Pan American airplane ticket (GX 6)—which Boonsak later changed to a Lufthanza ticket to Toronto, Canada (GX 8)

1975 (H.Tr. 552-53, GX 69; W.Tr. 117, GX 70). Further, although Box 6415, APO S.F. is a valid address at Utapao Air Base in Rayong, Thailand, Box 6415 has not been used since 1974 (H.Tr. 552-53, GX 69; W.Tr. 116, GX 70). While a Mary A. Baker does reside on the island of Waia in Hawaii, she has never lived at 320 Waia Kamio Road and does not know anyone working for the United States Air Force in Thailand or anyone named Louis Kramer (H.Tr. 428; W.Tr. 117, GX 70). Moreover, the address 320 Waia Kamio Road, Lahaina, Hawaii, does not exist on the island of Lahaina; the package bore too much postage for its weight; and the postage meter number on the package does not exist in any post office on the islands of Hawaii (H.Tr. 416-19; W.Tr. 117-18, GX 70).

—and an authorization for him to obtain money from a bank in Bangkok for his travel expenses to New York (GX 7, 7A). On February 26, 1976, Boonsak met Manop, who told him that Bruce Wheaton was in Thailand and staying at the Chavalit Hotel. Manop also said that Wheaton had gone to the Province of Rayong to visit Boonterm in the village of Utapao for the purpose of purchasing heroin from Boonterm, and that the heroin would be mailed by Head. In a conversation a few days later, Manop told Boonsak that Boonterm had come to Bangkok to sell the heroin to Wheaton (H.Tr. 241-52; W.Tr. 38-45).

On March 6, 1976, Boonsak left Bangkok for Toronto, Canada, where he was scheduled to meet his New York customers. Before arriving in Canada, however, Boonsak stopped in Frankfort, West Germany, for one day and stayed at the Frankfort Sheraton Hotel (GX 9). There, he made a telephone call to Manop at the coffee shop in Bangkok (GX 10, 20). Manop told Boonsak that Wheaton had left Thailand on the same date that Boonsak had departed and that Head had mailed two or three units to the United States for Wheaton (H.Tr. 252-54; W.Tr. 45-47). After arriving in Toronto and registering at the Lord Simcoe Hotel (GX 11), Boonsak met with Jack Taylor and Andy Fenrich, posing as Taylor's attorney, at the Captain's Table Restaurant, where they discussed the form of the payment of the $35,000 for the unit. In addition, Boonsak told them that Don (the name by which Boonsak knew Head) had mailed two or three units to Wheaton, who had just visited and purchased the units from Boonterm in Thailand. Boonsak further said that he had been instructed by Boonterm to tell Wheaton to send $20,000 Wheaton owed to Boonterm. Boonsak showed the agents the piece of paper bearing Wheaton's address and Boonterm's

identification card. Boonsak also stated that he had to return to Bangkok immediately because Don, who was working in the Air Force post office, was scheduled to leave Thailand by March 11 and that they (the Thai defendants and Head) had six units ready to be mailed to the United States. Boonsak stated that Don already had some heroin in San Francisco and that the New York customers could probably buy some of it. On the following day, March 8, 1976, Boonsak, using an airplane ticket (GX 12) supplied by Taylor and Fenrich, flew to New York and met with John Coleman and the other agents at the Oyster Bar in the Plaza Hotel in Manhattan. After Boonsak repeated what he had told the agents in Toronto, he was placed under arrest. Boonsak subsequently agreed to cooperate with the agents (H.Tr. 255-59, 287-91, 326; W.Tr. 48-53, 73-81, 90, 94-96).

On March 10, 1976, Jamroon Sawanabrooma, a Thai national working with DEA's regional office in Bangkok, drove with Matthew Maher, a Special Agent with the same office, to the vicinity of the Insaf Mansion apartment building at Soi 13 Sukhumvit Road. Jamroon, who was wearing a Kel transmitting device, left Maher and proceeded to apartment 107 in the aforementioned building, where Head lived. There, he met Head and introduced himself as "Thaveesak," Boonsak's uncle. He told Head that the package had arrived in New York and that Boonsak was in New York, but that Boonsak was having difficulty taking the money out of the United States. He asked Head for his telephone number so Boonsak could call Head about the money. Head agreed, wrote his telephone number on a piece of paper (GX 13), gave it to Jamroon, and instructed him as to the best time for Boonsak to call. This conversation was recorded (H.Tr. 346-51, 360-69, GX 65, 65A; W.Tr. 99-01, 104-07, GX 65, 65A).

After his arrest, Boonsak made three telephone calls that were recorded. On March 9, he called Manop at the coffee shop in Bangkok. They discussed, among other things, the amount of money Boonsak was to pick up for the unit that Don had mailed. In addition, Manop told Boonsak that Don lived on Soi 13 and they discussed the meeting of February 4 at Don's apartment, which Manop remembered having taken place in apartment number 107. Manop stated that Don was leaving Thailand on the 19th of March but was scheduled to stop working in the post office on March 11. Further, Manop told Boonsak that Bruce had left Thailand the same day that Boonsak had left and that Don had already mailed two units for Wheaton. Finally, Manop told Boonsak that there were more units prepared to be mailed, but that Don was not going to send them until he was paid for the mailing. The second phone call was made by Boonsak on March 10, 1976, to Head at the Bangkok number that Jamroon had obtained from Head. Head acknowledged that he had met Boonsak (whom he knew by Boonsak's nickname, "Sam") in February with Boonterm; that he had met Boonsak's "uncle" the previous day; that he had mailed the "Louis Kramer" package; and that he knew both Manop and Boonterm. He also told Boonsak that he had about four or five units in the United States that he planned to sell when he arrived there. Head said that after leaving Thailand he was going to "L.A." to see a friend. In addition, Head told Boonsak that Wheaton and Boonterm had met in Bangkok and that they had talked about their financial problems. The third phone call was made on March 23, 1976, to Bruce Wheaton, who was staying in Carson, California, just outside of Los Angeles. Boonsak identified himself as a messenger for Boonterm and stated that he had Boonterm's identification card. Wheaton acknowledged knowing Don and Boonterm and that he had recently visited Bangkok. Boonsak asked Wheaton's help in selling two units of

heroin and in sending the proceeds of the sale to Boonterm. Wheaton agreed to do so. When Boonsak asked the price at which the units could be sold, Wheaton told him that he did not want to talk about the price on the telephone (H.Tr. 259-62, 293-96, GX 20, 64, 64A, 66, 66A, 67, 67A; W.Tr. 53-55, 81-82, GX 20, 64, 64A, 66, 66A, 67, 67A).

On March 11, 1976, Head was arrested in Thailand. At the time of his arrest, Head had in his possession a shoulder bag containing a parcel.* After a warrant was obtained for the search of the parcel, it was discovered to contain stacks of United States currency totalling $26,800 (H.Tr. 351-55, GX 15, 16; W.Tr. 102-04, GX 15, 16).

On March 19, 1976, Agent Taylor, acting pursuant to a search warrant, seized from the post office at 90 Church Street in New York an envelope addressed to Bruce Wheaton (H.Tr. 296-99, GX 17, 18; W.Tr. 82-83, GX 17, 18).** The envelope contained a letter, dated March 8, 1976, signed, "From your friend Boonterm," and which read, in pertinent part: ". . . Bruce this time I consign to you (½) harp 'tur' . . . . " (GX 18). A "tur" is a

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* The parcel was addressed to "S/Sgt. Donald Head, OL 16 AMT, Box 7885, APO San Francisco, California 96303," with a return address of "MR. F. L. Cherry, 1342 Eastern Avenue NE, Apt. 101, Washington, D.C. 20019" (GX 15). Prior to trial, Frank L. Cherry was named as an unindicted co-conspirator.

** The full address on the envelope was as follows:

"TO Mr. Bruce E Wheaton
1048 E. 228 S.T.
Bronx 10466 Newyork
U.S.A."

The return address read as follows:

"From M.r. Boonterm Petgumnerd
'Permsuk farm.' In front of Utapao air-port
Satahip Shoburi Thailand" (GX 17).

term used by Thai narcotics traffickers to indicate a unit, and "½ harp tur" means half a unit or 350 grams of heroin (H.Tr. 372-73; W.Tr. 107).

On March 23, 1976, Wheaton was arrested at his residence in Carson, California, by a DEA agent. At that time, Wheaton surrendered his passport, which indicated that Wheaton had arrived in Bangkok on February 26, 1976 and departed Thailand on March 5, 1976. In addition, the following items were seized from Wheaton's residence pursuant to a search warrant: a small phone book containing the names and addresses of Donald Head, Frank L. Cherry and Boonterm Petgumnerd; an envelope addressed to Wheaton at "1048 E. 228 S.T., Bronx 10466 Newyork, U.S.A.," and containing a letter, dated February 23, 1976, that was signed, "From your friend Boonterm", and that stated in part: "I hope if you received my letter you will hurry to go to meet me in Thailand or hurry to sent money to me . . ."; an unfinished letter written to Donald Head; and Chavalit Hotel stationery and records from the hotel showing that Wheaton had stayed there from February 26 to March 5, 1976 (H.Tr. 421-27, 551, GX 21, 22, 22A, 23A, 100, 101).*

The Defense Case

Neither defendant offered any evidence.

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* The items seized from Wheaton's residence were not offered at his trial because of the questionable legality of the search. The dates of Wheaton's stay at the Chavalit Hotel were admitted by stipulation at his trial (W.Tr. 118, GX 70, 100, 101).

ARGUMENT

POINT I

The trial court properly admitted into evidence the $26,800 seized from Head after his arrest.

Head attacks his conviction on the ground that the trial court erred in failing to suppress the $26,800 in cash contained in a package in his possession at the time of his arrest.

The facts that were developed at a pretrial suppression hearing, held on May 3, 1976, and that are not in dispute are, briefly, as follows: On March 9, 1976, Special Agent Frederick Kerr of the Air Force Office of Special Investigations informed Captain Robert E. Roberts, Commanding Officer of the United States air mail terminal in Bangkok, that the DEA was conducting an investigation into alleged narcotics trafficking by a serviceman employed at Roberts' mail terminal, and gave Roberts certain descriptive information about the serviceman. Roberts stated that he believed Donald Head fit the description Kerr gave him. On March 10, 1976, a complaint was filed in the Southern District of New York charging Head with importing heroin from Thailand into the United States. Word of the filing of this complaint was immediately relayed to DEA officials in Thailand, where it arrived, because of the International Date Line, on March 11, 1976 (H.Tr. 30, 55-58, 98, 101-08).

Meanwhile, on March 10, Roberts learned that a registered parcel addressed to Head had been received at the terminal. Examining the package under a fluoro-

scope—as is routinely done at the air mail terminal pursuant to Air Force regulations *—Roberts and members of his staff determined that the parcel contained outlines of what appeared to be stacks of currency. Roberts relayed this information to Kerr. The package was not opened and was held at the mail terminal to be picked up by the addressee, Head (H.Tr. 33-41, 49-52, 61, 99-100).

On March 11, Roberts telephoned Head and asked him to come to the mail terminal to complete processing for his transfer to the United States. When Head arrived at the terminal at about 3:00 P.M. that afternoon, accompanied by his infant daughter, Roberts told him to complete his processing, pick up his mail and return to Roberts' office. When Head returned to the office shortly thereafter, he was placed under arrest on the basis of the Southern District of New York complaint, and a blue vinyl shoulder bag was taken from him. Head's daughter then began to cry, and Head asked Matthew Maher of the DEA's Bangkok office to open the shoulder bag and take out a bottle of milk to pacify the child. As he did so, Special Agent Maher noticed the unopened package in the bag and removed it. Head was advised of his constitutional rights and declined to consent to the search of the package (H.Tr. 18, 25-33, 60-66, 85-91, 96).

Shortly after the arrest, Special Agent Kerr telephoned the Air Force Office of Special Investigation at the Utapao Air Force Base and, after informing Special Agent Kirby Oak what had occurred, requested authori-

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* Under the Air Force's anti-contraband program, second, third and fourth class parcels are randomly opened at the air terminal and their contents examined. All other parcels are examined under fluoroscope machines (H.Tr. 50-51).

zation to open the parcel. At approximately 5:00 P.M., Kerr received from Oak notice that Colonel Howard F. O'Neal, the Commanding Officer for Air Force personnel at the Utapao Air Force Base, had signed a search warrant authorizing the opening of the parcel. At approximately 6:00 P.M., the package was opened by Kerr and others, and the $26,800 seized (H.Tr. 45-46, 53, 68-77, 80, 88-90, 102).

At the conclusion of the hearing, Judge MacMahon denied the motion to suppress and thereafter filed a written opinion, dated May 5, 1976, in which he held that the fluoroscopic examination and subsequent opening of the parcel were proper under Air Force regulations and did not violate Head's Fourth Amendment rights.

A. The fluoroscoping of the mail package was properly conducted pursuant to Air Force regulations and did not violate Head's constitutional rights.

Head contends that the fluoroscoping of the package by Air Force personnel was without authority and in violation of his constitutional rights.

The Don Muang air mail terminal where the package was received and fluoroscoped is directed and managed by the United States Air Force pursuant to Title 39, United States Code, Section 406, which states that the Postal Service may establish branch offices on Armed Forces and defense installations and that these branches shall be manned and postal services performed by Armed Services or other personnel.

The Air Force, recognizing that its mail facilities present a facile means for transporting contraband and

acutely aware of a modern day narcotic problem among its servicemen, has established an anti-contraband program to deter those using the mails from trafficking in illegal goods and drugs. Thus, in implementing Section 406, the Air Force has issued a comprehensive manual entitled "Postal Service—Responsibilities and Procedures (January 23, 1973)," which reads in part as follows:

> "Fluoroscope and other detection equipment will be used by military postal personnel as directed by the military department which operates the military post office." *Id.* at Chapter 14-3(c).

and,:

> "Commanders at all levels will establish continuing information programs to discourage and deter mailing of narcotics, drugs and other contraband and will review their procedures to insure that effective controls are implemented to prevent the use of personal mail for the mailing of all forms of contraband." *Id.* at Chapter 14-3(i).

In addition to subsection (c), subsections (f) and (j) explicitly provide for the examination, including fluoroscoping, of *incoming* packages at Air Force postal installations.* Thus, it is clear that the fluoroscoping of the package was done in the normal course of the operation of the air mail terminal pursuant to explicit authorization.**

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* Furthermore, the Air Force Manual on Postal Operations instructs that "[i]f possible, a 100% inspection should be performed on all parcels... entered into postal channels regardless of destination." Chapter 92-4 of United States Air Force Postal and Courier Operating Procedures.

** The statutes relied on by Head—39 U.S.C. §§ 3623 and 4057—are inapposite, as they proscribe the *opening* of first class mail. Air Force personnel are prohibited from opening first class mail without a warrant (H.Tr. 50-51), and the package in this case was not opened prior to Head's arrest.

Head further argues that the fluoroscoping was an unreasonable search in violation of the Fourth Amendment. A fluoroscopic examination alone is not, however, a search and seizure within the meaning of the Fourth Amendment. "It has often been held that the use of certain 'sense enhancing' instruments to aid in the detection of contraband . . . does not constitute an impermissible Fourth Amendment search." *United States* v. *Bronstein*, 521 F.2d 459, 462 n.3 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). Thus, this Court has rejected the contention "that the police are limited to the resources of their physical senses and that the use of scientific assistance . . . in pursuit of the criminal is impermissible." *Id.* at 462.

Fluoroscoping reveals only a two dimensional outline of the contents of the object being examined, similar to that which might be observed by holding the object up to a strong light.* The Supreme Court has specifically excepted such "outward" examinations of the mail from the ambit of the Fourth Amendment. *Ex-parte Jackson*, 96 U.S. 729 (1877). A case that is particularly instructive is *United States* v. *Sohnen*, 298 F. Supp. 51 (E.D.N.Y. 1969). There, the disputed search involved the actual opening of the defendant's mail containing illegally imported gold coins. The court relied in part on an earlier "spectroscopic examination [of the package which] revealed disc-shaped objects," in holding that the opening of the package was proper. *Id.* at 55. See also *United States* v. *Richardson*, 388 F.2d 842 (6th Cir. 1968).

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* At the suppression hearing, Captain Roberts testified that the fluoroscope does not take a hard picture, as an X-ray machine does, but rather shows outlines that give some idea of what is in the package (H.Tr. 34-35).

Even assuming *arguendo* that the fluoroscoping is a "search" within the meaning of the Fourth Amendment, its use in the context of this case was clearly reasonable and should not be condemned as violating the Fourth Amendment. See *United States* v. *Edwards*, 498 F.2d 496, 498 (2d Cir. 1974). The Supreme Court has noted that the "specific content and incidents of [one's rights under the Fourth Amendment] must be shaped by the context in which [they are] asserted." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). Specifically, the Supreme Court has recognized that "the different character of the military community and of the military mission require a different application of [constitutional] protection." *Parker* v. *Levy*, 417 U.S. 733 (1974). See also *Schlesinger* v. *Councilman*, 420 U.S. 238 (1975); *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).

In view of the magnitude and the seriousness of the drug problem in the Armed Forces, *Schlesinger* v. *Councilman*, *supra* at 760, the fluoroscoping of the defendant's package was reasonable and permissible under the Fourth Amendment. The Fifth Circuit recently held warrantless drug inspections conducted as part of the Army's drug abuse program to be reasonable and constitutionally permissible under the Fourth Amendment, noting that "to require a warrant as a pre-condition for a valid drug inspection would prove unduly burdensome and would severely undermine the effectiveness of the drug inspections." *Committee for G. I. Rights* v. *Callaway*, 518 F.2d 466, 477 (5th Cir. 1975). The Fifth Circuit reasoned, inter alia, that the increased incidence of drug abuse in the Armed Forces poses a substantial threat to the readiness and efficiency of our military forces; that the "expectation of privacy," *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, *J.*, concurring), is different in the military than it is in civilian life; and that the

primary purpose of the inspections was "to ferret out illegal drugs." *Committee for G.I. Rights* v. *Callaway*, *supra* at 476-77. The same logic supports the routine fluoroscoping of packages at the Air Force mail terminal, pursuant to which Head's package was examined in the instant case. Particularly significant, as the court below noted, is the absence of any expectation of privacy by Head, especially in light of his service in the Air Force as a postal shift supervisor and his consequent familiarity with the fluoroscoping procedures.

Moreover, the Second Circuit has recognized that, even outside of the military context, " 'administrative searches', conducted pursuant to a general regulatory scheme rather than an investigation to secure evidence of a crime, have regularly been upheld where the statutory procedures have been reasonable." *United States* v. *Edwards*, *supra* at 498 n.5. The Air Force regulations cited above clearly establish the general regulatory nature of the fluoroscopic examination carried out at the Don Muang air mail terminal. "Danger *alone*" may satisfy the test of reasonableness. *United States* v. *Edwards*, *supra* at 500. The presence of illegal drugs in the Armed Forces creates a very real danger to the health of servicemen and the military preparedness of our nation. *Committee for G.I. Rights* v. *Callaway*, *supra*. As Judge MacMahon found and noted, "we deal here with a United States military installation, far from our own shores, in a country where the presence of our military is a tense political issue," 76 Cr. 295 (May 5, 1976), slip op. at 7, and "international trafficking in drugs presents serious dangers to all our citizenry, a danger just as real as that presented to airline passengers that their plane could be skyjacked." *Id.* at 10. The danger is certainly far greater and the search far more reasonable here

than in other situations where similar general administrative searches have been upheld. *United States* v. *Vaughan*, 475 F.2d 1262 (10th Cir. 1973) (dictum); *United States* v. *Miles*, 480 F.2d 1217 (9th Cir. 1973) (search of all commercial vehicles entering a restricted military base); *Downing* v. *Kunzig*, 454 F.2d 1230 (6th Cir. 1972) (search of briefcases and packages carried into federal buildings). Indeed, the fluoroscoping of a mailed package is "far less intrusive than searches of individuals or of their immediate effects." *United States* v. *Doe*, 472 F.2d 982, 985 (2d Cir.), *cert. denied*, 411 U.S. 969 (1973).

Moreover, the package was fluoroscoped shortly after its arrival in Thailand. Many decisions of the Supreme Court and the United States Courts of Appeals have underlined the distinction, for purposes of the Fourth Amendment, between searches conducted within a country, in which case the warrant requirement of the Fourth Amendment applies, and searches at points of entry. *Carroll* v. *United States*, 267 U.S. 132, 151-52 (1925); *Boyd* v. *United States*, 116 U.S. 616 (1886). The rationale for the distinction is that the purpose of the latter is not to apprehend persons but to prevent the introduction or exportation of contraband. *Carroll* v. *United States*, *supra*. Thus, searches by customs officials need not be supported by a warrant or based upon probable cause. *United States* v. *Ortega*, 471 F.2d 1350, 1360 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Glazion*, 402 F.2d 812 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969). See also *United States* v. *Hill*, 430 F.2d 129 (5th Cir. 1970); *Gonzalez-Alonso* v. *United States*, 379 F.2d 347 (9th Cir. 1967). Compare *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973)

(search of a person at border need not be based on probable cause or warrant.)

Further, the right to search for possible customs violations extends to first class mail that has crossed international boundaries, *United States* v. *King*, 517 F.2d 350, 352-53 (5th Cir. 1975); *United States* v. *Odland*, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *United States* v. *Swede*, 326 F. Supp. 53 (S.D. N.Y. 1971), including mail between a branch post office at an Armed Forces post in a foreign country and the United States. *United States* v. *Milroy*, Dkt. No. 75-1675 (4th Cir. Mar. 2, 1976).*

It follows from these decisions that even if the package had been opened when it was received at the air mail terminal—in contrast to the far less intrusive examination that actually occurred—the search would not have offended the Fourth Amendment. Indeed, the cases cited above concerned searches that occurred *in* the continental United States, and quite arguably the rationale supporting warrantless customs searches applies with even greater force when the search takes place on a military installation abroad. Not only is the applicability of the Fourth Amendment more tenuous, see *United States* v. *Cotroni*, 527 F.2d 708 (2d Cir. 1975), but the interests of the military and of the nation in foreign

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* The fact that the package was sent from the United States to the air base in Thailand, rather than in the opposite direction, does not distinguish this case from the reasoning applied in other customs search cases. Such a check of mail from the United States for money sent in payment for contraband mailed into the country provides an ". . . effective [control] . . . to prevent the use of personal mail for the mailing of all forms of contraband," as authorized by the Air Force regulations dealing with customs examinations. Postal Service—Responsibilities and Procedures (Jan. 23, 1973); Chapter 14-3 (i).

relations, as has already been discussed, affect the "reasonableness" of the search. *Best* v. *United States*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951). The fluoroscopic examination of the package was entirely proper.

B. The seizure and opening of the package following Head's arrest were lawful.

Even if the fluoroscopic examination of the package violated the Fourth Amendment, its seizure and opening subsequent to Head's arrest were proper. Since Head has not challenged the lawfulness of his arrest—and rightfully so, in view of the overwhelming probable cause that existed for his arrest—the search must be upheld as incident to his arrest, the package being "within his immediate control" at that time. *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

Although the search of the package did not occur until approximately three hours after Head's arrest, the search remained "incidental" to the arrest and was thus valid. "[O]nce an accused has been lawfully arrested, the effects in his possession that were subject to search at the time and place of the arrest may lawfully be searched and seized without a warrant even after a substantial time lapse following the arrest." *United States* v. *Edmonds*, 535 F.2d 714, 720 (2d Cir. 1976); see *United States* v. *Edwards*, 415 U.S. 800 (1974); *United States ex rel. Muhammed* v. *Mancusi*, 432 F.2d 1046 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

Moreover, the package was not opened and its contents searched until after a search warrant was signed by the

Commanding Officer of the air base. Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836(a), explicitly authorizes the President to prescribe rules concerning the procedures to be used in military criminal matters. Chapter 152 of the Manual for Courts-Martial of the United States provides that a search may be authorized by a commanding officer upon a showing of probable cause * in certain situations, including, "a search of property owned, used, or occupied by *or in the possession of*, a person subject to military law, . . . [and] property being situated in a military installation, encampment, or vessel or some other place under military control or situated in occupied territory or a foreign country" (emphasis added). The fact that no written affidavit was made by the government agent requesting the warrant is irrelevant. Under military law, authority to search may be granted upon oral and unsworn statements of a government agent. *Wallis* v. *O'Kier*, 491 F.2d 1323 (10th Cir.), *cert. denied*, 419 U.S. 901 (1974); *United States* v. *McFarland*, 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970); *United States* v. *Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).** The search of the package was therefore conducted pursuant to a lawful warrant.

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* Such a procedure was, in the factual context of this case, necessary, since recourse to a federal magistrate or state judge as required by Rule 41 of the Federal Rules of Criminal Procedure was a logistical impossibility.

** Head did not claim in his pre-trial suppression motion or at any other time below that the search was made on less than probable cause, and would thus be foreclosed from doing so here. *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). In view of the evidence known to the Thailand DEA agents and Air Force police agents at the time of the arrest and seizure, such a claim would have been frivolous.

In sum, the trial court did not commit error in admitting into evidence the $26,800 seized from Head after his arrest.*

POINT II

Wheaton was shown to be a member of the conspiracy by a fair preponderance of the evidence independent of his co-conspirator's declarations, and there was more than sufficient evidence to support both Head's and Wheaton's convictions.

Wheaton claims that the hearsay declarations of the other conspirators should not have been admitted against him because there was insufficient evidence, independent of those declarations, that he was a member of the conspiracy. In addition, both Wheaton and Head contend that the evidence in general was insufficient to support their convictions.

A. Wheaton was shown by a fair preponderance of the independent evidence to be a member of the conspiracy.

It is the well established rule in this Circuit and elsewhere that hearsay declarations made by one conspirator are admissible against another conspirator if a "fair preponderance of the evidence independent of the hearsay declarations" shows that the declarations were made

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* Even if the admission of the $26,800 was error, in view of the overwhelming evidence of Head's guilt — including the tapes of his conversation with Jamroon and his telephone conversation with Boonsak after the latter's arrest, and the in-court identification of him by Jamroon and Boonsak—it was harmless beyond a reasonable doubt. *United States* v. *Ong*, Dkt. No. 76-1087 (2d Cir. Sept. 14, 1976); *United States* v. *Glasser*, 443 F.2d 994, 1003 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

in furtherance of the conspiracy and that the defendant against whom the statements are offered was a member of that conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).* It is also clear that this independent evidence may consist completely of circumstantial evidence. *United States* v. *Wiley*, 519 F.2d 1348, 1350-51 (2d Cir. 1975); *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 903 (1974); *United States* v. *Geaney*, *supra*.

In the instant case, there is no dispute that beginning at least in the Fall of 1975 and continuing until March 1976, when several of the conspirators were arrested, an international conspiracy existed to import heroin from Thailand into the United States and distribute it there.

In his telephone conversation with Boonsak on March 23, 1976, Wheaton, in his own words, confirmed his membership and specific role in this conspiracy.** Wheaton admitted knowing Boonterm and Head (Don), and acknowledged the role played by Boonterm (the supplier) and Head (the sender) in the criminal scheme.*** More-

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* Evidence that is admissible under an exception to the hearsay rule other than the exception for statements of co-conspirators may be considered in making the finding under *Geaney*. 417 F.2d at 1120 n.3.

** The transcript of the telephone conversation (GX 67, 67A) is set forth in full in the appendix to Wheaton's brief on appeal.

*** This portion of the transcript (GX 67A) reads:—

"BOONSAK: Mr. Boonterm told you about that, about I'm come to New York.

WHEATON: Um, hum, how did you get my number?

BOONSAK: Ah — I — before I came here Boonterm gave me your address in Bronx. I went down there, I never see you. They said you

[Footnote continued on following page]

over, when Boonsak told Wheaton about his difficulty in selling the "units" and "merchandise"--code words for heroin—that Boonterm and Head had s[illegible] him, Wheaton clearly indicated that he understood wh[illegible]t Boonsak was talking about and said that he would call Boonsak back. Wheaton asked Boonsak where he was staying in New York and what his telephone number there was.* After Boonsak told Wheaton that information, as well as his physical description and the fact that he had Boo[illegible]erm's identification card, Boonsak again asked Wheat[illegible]o help in selling the two units. Wheaton agreed to do so and further agreed with Boonsak's suggestion that Wheaton take the two units, sell them and send the money to Boonterm.** Finally, when Boonsak asked Wheaton how

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went to Bangkok. And I call to Boonterm last night. Boonterm gave me this number to get in touch with you.

WHEATON: Yes, what's up?

BOONSAK: Ya. I, I, I need some help from you.

WHEATON: Like what?

BOONSAK: Yes, uh — I got the, the merchandise, two units, you know, they send it from Bangkok. Boonterm send it to me, but I cannot entrust the customer here because I deal this bus, business with him before, but this time they try to cheating me; I have two units in here. I try you to help me. Don, do you know Don, right?

WHEATON: Um hum.

BOONSAK: Donald Head, yah he send it to me. Can help me that?

WHEATON: I don't know. I'll have to get back with you man because I not going to be in New York for a while now."

* Wheaton never called Boonsak back because after this telephone call federal agents arrested Wheaton at the Carson, California address.

** "BOONSAK: Please help me, okay, because I don't know anything well you know. I have two units in here, but I don't know how to do it.

[Footnote continued on following page]

much he, Wheaton, could sell the units for, Wheaton answered, ". . . don't know. *Don't ask me that question on the phone* . . ." (emphasis added) From this last remark, Judge MacMahon was warranted in inferring that Wheaton was an experienced narcotics dealer and thus reluctant to talk about specific details of his trade, such as the price of heroin, on the telephone.

Other independent evidence also tied Wheaton to the conspiracy. While in the Air Force, Wheaton had been stationed at the Utapao Air Base in Rayong, Thailand, where Boonterm lived. Wheaton visited Bangkok and stayed at the Chavalit Hotel from February 23 to March 5, 1976. In addition, on February 4, Boonterm, when giving Boonsak his identification card and the slip of paper bearing Wheaton's address in the Bronx, told Boonsak that the latter should visit Wheaton and tell Wheaton that he should send the $20,000 he owed Boonterm.* Records of the New York State Department of Motor

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WHEATON: Um.
BOONSAK: And, why not, if you can help me you take this this two units then after you selling you send the money to the Boonterm directly, okay.
WHEATON: Um hum.
BOONSAK: It's the best way to do it because I cannot bring the money. Do you have any idea I can bring the money out of this country?
WHEATON: No, unless you could send it to him.
BOONSAK: Yeah, would you please, okay?
WHEATON: Um. . . ." (GX 67, 67A).

* This evidence was not hearsay but, rather, an "utterance contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it," Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 236 (1922); see *United States* v. *An-*

[Footnote continued on following page]

Vehicles established that Wheaton had used the address Boonterm gave Boonsak. This evidence, in conjunction with the phone conversation in which Wheaton acknowledged knowing Boonterm and Head and their roles in the heroin distribution scheme and in which he agreed to assist Boonsak in selling the two units, amply supported the finding that Wheaton was an active member of the conspiracy from sometime before February 4, 1976 until his arrest in March.

Judge MacMahon's finding that the Government had established Wheaton's membership and participation in the conspiracy by a fair preponderance of the evidence independent of the hearsay declarations of the conspirators was, therefore, correct and should not be disturbed. *United States* v. *Wiley*, 519 F.2d 1348, 1350-51 (2d Cir. 1975); *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir. 1974), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 963 (1974); *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973), *cert. denied*, 414 U.S. 1004 (1974); *United States* v. *Carfaro*, 455 F.2d 323 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

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nunziato, 293 F.2d 373, 376-77 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961), or a "verbal act" showing the existence of a conspiracy to distribute narcotics in which Boonterm was the supplier and other persons were the sellers and collectors of money. See *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1109 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

The evidence was sufficient to support Wheaton's convictions.

Wheaton also argues that there was insufficient evidence to support his convictions.* As previously noted, the evidence clearly established the existence of a conspiracy, beginning in the Fall of 1975 and continuing into March 1976, to smuggle heroin into the United States and distribute it there. "[O]nce a conspiracy is shown, only slight evidence is needed to link another defendant with it . . . [citation omitted]." *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); see *United States* v. *Braasch*, 505 F.2d 139, 148 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). The properly admitted hearsay statements of Wheaton's co-conspirators made in furtherance of the conspiracy, along with the independent evidence discussed in the preceding section, amply supported Wheaton's convictions on the charges against him in the indictment.

On February 4, 1976, while in Head's apartment, Boonterm gave Boonsak a slip of paper bearing Wheaton's name and his address in the Bronx, along with Boonterm's Thai identification card bearing his photograph. Boonterm instructed Boonsak to visit Wheaton, show him the card, and tell Wheaton to send the $20,000 he owed Boonterm.** The jury was warranted

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* The second point of Wheaton's brief on appeal is that his "conviction . . . must be reversed on the ground that there is insufficient evidence on which to sustain his conviction," while the third point is that his "conviction . . . for importation and for distribution of heroin, counts four and five, must be reversed on the ground that there is insufficient evidence on which to sustain his convictions." The arguments in the two sections appear to be essentially the same, and will be treated here together.

** In addition, Manop had earlier told Boonsak that Boonterm knew a man, Bruce, who in turn had a friend named Don who could mail heroin out of the country.

in inferring that Wheaton had not yet paid Boonterm for a past shipment of heroin, and that Boonsak had joined a conspiracy in which Wheaton was already a member, specifically, a distributor of the heroin supplied by Boonterm and mailed by Head.

Further, Wheaton was registered at the Chavalit Hotel in Bangkok from February 26 to March 5, 1976.* In late February and early March, Manop told Boonsak that while Wheaton was in Thailand he had come to Utapao in the Rayong province and purchased two or three units of heroin from Boonterm, and that Head had mailed the units to the United States for Wheaton. Wheaton's role in the conspiracy was further established by Boonsak's March 9 taped conversation with Manop, in which Manop stated that Wheaton had left Thailand the same day that Boonsak had left and that Head had already mailed two units for Wheaton; in Boonsak's March 10 taped conversation with Head, in which Head stated that he was going to "L.A." to see a friend, and that Wheaton and Boonterm had talked about their financial problems when they met in Bangkok; and by the letter from Boonterm to Wheaton, seized from the post office, in which Boonterm wrote that he consigned to Wheaton "½ harp tur," or half a unit of heroin (350 grams). When this is all viewed in conjunction with the other evidence against Wheaton discussed in the preceding section of this brief, including the taped conversation between Boonsak and Wheaton on March 23, in which Wheaton through his own words showed his knowledge of the conspiracy, admitted his association with both Boonterm and Head, and agreed to sell the "two units" Boonsak had in New York and send the money to Boonterm, there was ample evidence "upon which a reasonable mind might fairly conclude

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* Wheaton stipulated to this fact at trial. In addition, his passport showed his entry and departure from Thailand on February 26, 1976 and March 5, 1976, respectively.

guilt beyond a reasonable doubt." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); see *United States* v. *De Garces*, 518 F.2d 1156, 1159-60 (2d Cir. 1975).*

Wheaton further contends that there was no evidence directly connecting him to the February 23, 1976 shipment of heroin that was the basis of Counts Four and Five. Wheaton, however, being an integral member of the conspiracy prior to February 4 and continuing to participate in it into March, was responsible for the

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* Wheaton argues that the evidence against him was a "single act"—the telephone conversation with Boonsak—that was insufficient to prove his membership in the conspiracy. He ignores, however, the substantial evidence discussed above showing Wheaton's participation in the conspiracy at least by February 4 and his activities thereafter in furtherance of the conspiracy. The "single act" cases Wheaton relies on are completely inapplicable to the facts here. See *United States* v. *Torres*, 503 F.2d 1120, 1123-24 (2d Cir. 1974).

Wheaton also claims that the trial court erred in instructing the jury on the necessity of finding membership in the conspiracy only on the basis of evidence independent of the hearsay statements of co-conspirators. However, a full reading of Judge MacMahon's charge shows that he properly instructed the jury:

> "Here again, in determining the intent of the defendant, it is obviously impossible to look into his mind. However, intent and knowledge may be inferred from the way a defendant acts, by his statements, and by all the surrounding circumstances.
>
> Thus, the old adage, 'Actions speak louder than words,' also applies here. In this connection, you may not rely upon statements of one defendant to find that another defendant was a member of a conspiracy. You must determine the membership of this defendant solely upon the evidence concerning his own actions, his own conduct and his own statements." (W.Tr. 16[illegible])

Moreover, after the instructions to the jury, Wheaton neither objected nor requested any further instructions on any subject. Consequently, he is now foreclosed from raising this issue on appeal. *United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir.), *cert. denied*, 422 U.S. 1031 (1975).

substantive offenses committed by his co-conspirators in furtherance of the conspiracy, even though he may not actually have participated in the substantive offenses, *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975); *United States* v. *Aloi*, 511 F.2d 585, 600 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States* v. *Cobb*, 446 F.2d 1174, 1177 (2d Cir.), *cert. denied*, 404 U.S. 984 (1971), and in response to a specific question from the jury, Judge MacMahon, without objection from Wheaton, instructed them as to the liability of the defendant for the acts of his co-conspirators.*

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* "The Court: I have your note:

'Does membership in a conspiracy make one responsible for all acts of the other members, whether known or unknown?'

I take it you mean whether they know the actor or whether they know what he does. The answer is yes, so long as the act of any member of the conspiracy is in furtherance of the purposes of the conspiracy and while the defendant is still a member of it, he is responsible for the acts of any other member of the conspiracy, even though he is not present, even though he does not know who is doing the act, or even though he doesn't know what is done.

As I told you, every member of a conspiracy is a partner or an agent of every other member, and therefore the act of any member of the conspiracy during its existence in furtherance of the purposes of the conspiracy binds every other member so long as he is still a member of the conspiracy. He is bound by everything that takes place by a conspirator after he becomes a member.

I think that answers your question.

Any exceptions?

Mr. Virella: None, your Honor.

Mr. Solomon: None, your Honor." (W.Tr. 180-81)

C. The evidence was sufficient to support Head's convictions.

Head similarly attacks his convictions on the ground that the proof submitted by the Government was insufficient. The claim is utterly frivolous.

Boonsak identified Head at trial as the man whose apartment he had visited in February 1976 with Boonterm, Manop and Perm, and who had explained to him how the heroin was to be mailed out of the country.* Jamroon also identified Head as the person with whom, when Jamroon was posing as Boonsak's uncle, he spoke about the package of heroin that was received by the agents in New York on February 23, 1976. Moreover, the tape of that highly incriminating conversation was admitted into evidence, as was the tape of Boonsak's March 10, 1976 telephone conversation with Head. In addition, Head's supervisory position at the air terminal permitted him to arrange for the mailing of the packages of heroin; Head was in fact scheduled to leave Thailand in early March, as Manop had told Boonsak; and when

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* Head seems to argue that Boonsak's testimony was not corroborated and that the uncorroborated testimony of an accomplice is insufficient to support Head's conviction. Not surprisingly, Head's assertion that the uncorroborated testimony of an accomplice cannot support a conviction is unencumbered by any citations of decisional authority, since federal law is well settled that conviction upon such testimony is proper. See, *e.g.*, *United States* v. *Bernstein*, 533 F.2d 775, 791 (2d Cir. 1976); *United States* v. *Messina*, 481 F.2d 878, 881 (2d Cir. 1973), *cert. denied*, 414 U.S. 974 (1974); *United States* v. *Ferrara*, 458 F.2d 868, 871 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972). In any event, as discussed in the text, Boonsak's testimony was neither uncorroborated nor the only evidence against Head.

Head was arrested he had in his possession the package containing $26,800 in cash. In short, the evidence against Head was overwhelming.

In sum, the evidence presented at both trials was more than sufficient for the jury to find Head's and Wheaton's criminal participation in the conspiracy as a sender and seller, respectively, of the Thai heroin. See, e.g., *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973), *cert. denied*, 414 U.S. 1004 (1974); *United States* v. *Terrell*, 474 F.2d 872, 875-876 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).*

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* Judge Friendly's statement in *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), is particularly apposite here:

> "In passing on the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none. To be sure, the defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version . . ." [fn. omitted].

POINT III

The evidence at trial proved the existence of the single conspiracy charged in the indictment.

Head argues that the Government's proof at trial demonstrated the existence of two conspiracies, with Head being a member of each one. As already discussed, however, the evidence quite clearly established a single classic narcotics conspiracy. Boonterm, Manop and Perm were the Thai suppliers of the heroin, which was given to Head. Head's critical responsibility was to mail the heroin through the Armed Forces postal system to the United States. Once it arrived in the United States, Wheaton and Boonsak distributed the heroin. Moreover, since Head was tried alone, even if the Government had introduced evidence of more than one conspiracy he could not have been prejudiced. See *United States* v. *Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976).*

POINT IV

The trial court did not demonstrate any prejudice against Head.

Head charges that Judge MacMahon's behavior during the trial demonstrated such prejudice against and so intimidated the defense that he was prevented from receiving a fair trial. The argument is totally without merit.

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* It should be noted that this is the first time Head raises this multiple conspiracy issue. At trial, Head failed to submit any instructions concerning multiple conspiracies both prior to and after the court's charge to the jury. Thus, he is now foreclosed from raising the issue on appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 393 U.S. 907 (1966).

The main Government witness, Boonsak, a Thai national, testified on direct examination both in English and, when necessary, through a Thai interpreter. It was evident, therefore, that the witness had an English language problem that made it necessary to put leading questions to him. The trial court was fully aware of this language problem (H.Tr. 149, 156, 159, 180, 250, 263-64), and because of it asked defense counsel to ask Boonsak leading questions during cross-examination (H.Tr. 265, 443, 464-66). Nevertheless, defense counsel proceeded to ask unclear, confusing and open-ended questions,* apparently as part of a trial strategy aimed at confusing the witness and forcing him to use the services of the interpreter, which, understandably, the witness did. Having accomplished this strategic purpose during a long and time consuming cross-examination,** defense counsel was able to argue in his summation the following:

> ". . . Now, Mr. Boonsak would have you believe that when he testified he had a language problem. I submit to you from my own observation and from Mr. Boonsak's own testimony he didn't have a language problem. I submit to you that he understood each and every word I said very clearly, but chose not to answer it because he could not answer it truthfully.

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* These unclear, open-ended questions, which at times used slang terminology, are typified by the following:

> ". . . Before you had this conversation with Mr. Jack on February 13, 1976, sir, did you speak to Mr. Manop in Thailand about the contents of this conversation or about any conversation you are going to have? (H.Tr. 519)."

** Among other things, defense counsel asked Boonsak to explain the meaning of statements in nearly all fourteen of the taped conversations that were introduced into evidence. See H. Tr. 484.

> Why do I say that? Number 1, if I recall correctly, Mr. Boonsak testified on direct examination without the benefit of an interpreter. Mr. Boonsak testified during his cross-examination that he was here for a number of months, two to three months, I believe he said, and he attended classes five days a week at the New York Business School. And I assume that we all understand those classes were conducted in English and I don't think Mr. Boonsak had any interpreter with him at that time. So I suggest to you very strongly, if I may, that Mr. Boonsak was hiding behind that interpreter and I submit to you that in my opinion Mr. Boonsak was one of the most evasive people I have ever seen.
>
> Every time I asked him a question that called for a yes or no answer, we went back to Mr. Manop, Mr. Manop said this, Mr. Manop said that, but I could never really get a clear and definitive answer from him." (H.Tr. 569-570)

As Head's counsel pursued this defense tactic, which consumed the better part of two days,* Judge MacMahon understandably became concerned that the jury was being bored and that the defense was unduly wasting the valuable time of the court and jury. A complete reading of the Boonsak cross-examination shows that Judge MacMahon repeatedly asked that leading questions be

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* Head seeks to give the impression that the trial court improperly cut off his cross-examination of the witness (Head Br. at p. 30). However, the exchange that he quotes is taken out of context, since it occurred near the end of the first full day of cross-examination. Head resumed his lengthy cross-examination of Boonsak on the following day and was not curtailed in conducting further cross-examination.

put to the witness and, on one occasion outside the presence of the jury, offered to assist counsel in this regard:

". . . Q. Did Mr. Manop, or Mr. Boonterm, or Mr. Perm ever mail a package of heroin from Thailand without your being there? . . .

. . . A. [Through interpreter:] I don't understand the question very clearly. What do you really mean by it?

The Court: All right. He doesn't understand it.

Q. Could Mr. Manop, or Mr. Boonterm, or Mr. Perm Petkamnerd mail or make arrangements to mail a package of heroin from Thailand without your being there?

The Court: Mr. Perl, would you please put leading questions? This is cross-examination. In that way maybe we will progress somewhere on cross-examination. Put leading questions.

Mr. Perl: Did the witness give an answer to this one?

The Interpreter: No.

Q. Do you understand my question?

A. Not so clear, sir.

Q. Not so clear, okay. Could Mr. Manop, or Mr. Boonterm or Mr. Perm——

The Court: That is not a leading question. I direct you to put leading questions.

We will take a short recess. If you come to the bench, I will tell you how to do it. Come on. [The jury left the courtroom.]

[In open court; jury not present:]

The Court: The jury is out now. By a leading question I mean that you can suggest the answer. You are examining as though it were a direct examination. This takes terribly long and it doesn't go any place, particularly with the barrier of this foreign language here. Put leading questions to him that call for a yes or no answer.

What are you trying to drive at here: Could he mail a letter? Sure, he could mail a letter. What is to stop him? Do you imply he is a cripple? Do you want to know whether he communicated with Head? I don't know what you mean, what you are searching for.

Mr. Perl: I specifically asked for could the package be mailed—the witness is right here—could the package be mailed.

The Court: I don't know how he could answer.

Mr. Perl: I don't mean to be rude.

The Court: I am sure you don't, but you seem to be awfully dense about it. Please, I am telling you that you are going about it the wrong way. Please listen to me. Put leading questions.

Could a package be mailed? What do you mean? Your question isn't clear. 'Could' embraces a whole lot of things. Straighten them up, sharpen them up a little bit. Move along or we will be here forever.

[Recess.]

[At the bench; jury not present.]

The Court: Come up, please. Tell me what you are trying to do and maybe I can help you.

Is it some kind of screen between the mailing of the package or something? I don't understand what your offer is.

Mr. Perl: Could I ask that the witness be excused from the witness box and I will be happy to discuss it with the Court.

The Court: Step down back in there for awhile.

[Witness temporarily excused.]

Mr. Perl: The man has constantly stated that he has to be back before the 10th and I want to know—I want to show that he is not required to be there for the purpose of mailing the package. That's it.

The Court: Why don't you put it to him just that way. 'It wasn't necessary for you to be there to have the package mailed to New York, was it, by someone else?' Put it that way. He will either say yes or no. Put a leading question.

Mr. Perl: All right." (H.Tr. 463-66)

It is thus apparent that Judge MacMahon was doing his best to clarify the issues and questions so the jury could more readily understand the evidence and the trial could proceed at a reasonable pace and without unnecessary delays. Following the discussion quoted above, however, defense continued to ignore the judge's suggestion to lead the witness. It was against this background, and as defense counsel was again attempting to elicit from Boonsak the "meanings" of some of the fourteen taped conversations (H.Tr. 476-08), that the following "incident", about which Head primarily complains, occurred:

"Q Mr. Boonsak, you previously told us, you made st. ents, your statements that it is on the way, it is on the way, meant that merchandise had been mailed by Mr. Head to San Francisco. Is that true or is that not true?

A. [Through interpreter:] I guess that is the same merchandise, because that is what he told me.

It's the same, similar conversation I had with Manop, and that was alsc recorded in one of the tapes: that what we actually did was, we tried to get the first deal through, and then I have to call back from time to time to find out what's going on and to develop the further business.

Q. Mr. Boonsak, very simply: Was the merchandise in San Francisco or was it not?

A. [Thr gh interpreter:] As I have explained to you an have answered you earlier——

Mr. Hea: Excuse me, Mr. Interpreter I would move to strike the answer as unresponsive. I have asked for a yes-or-no answer. If the witness is incapable of answering, he should say so.

The Court: Denied.

Go ahead, answer it, Mr. Interpreter.

A. [Through interpreter:] As I have answered your question earlier, I was told by all this thing. I can't tell you the full details in yes or no. They told me that whenever the first deal is concluded, I have to call back and find out all the activities going on from time to time. I cannot answer you with this kind of question.

Q. Are you telling me, Mr. Boonsak, that any information you said you gave to Mr. Taylor was only based on what Mr. Manop told you?

Mr. Virella: Objection.

A. [Through interpreter:] All the details and all the discussion I had with Mr. Taylor, that is what Manop told me. Manop told me, we discuss about it, and I tell—he ask me to tell it to Mr. Taylor.

Q. And he asked Mr. Boonsak to tell it to Mr. Taylor.

The Court: Yes. That was the answer. Next question.

Mr. Perl: All right, sir.

The Court: We don't need echoes back there.

Mr. Perl: Well, I just want to make sure I heard it.

The Court: Please.

Q. Mr. Boonsak, further down, do you remember saying to Mr. Taylor, 'Oh, he did not know, nothing. I just, I just pay him two thousand five hundred dollars for to mail that parcel, that's all.

'Taylor: You pay him two thousand five-hundred dollars?'

Whom were you talking about, Mr. Boonsak?

A. [Through interpreter:] According to what I have testified earlier, that every time Manop told me that every time they asked Don to mail for them, they asked for 25,000 baht—$2,500, for each packet mailed.

Q. Mr. Boonsak said——

Mr. Virella: Objection. He has not finished his answer, your Honor.

The Court: Yes, let him finish. Don't be impatient.

Mr. Perl: Sorry.

A. [Through interpreter:] But it was this time that we talk about the mailing of the 700 grams that he, instead of taking the money, he wanted one unit.

And being the reason that Don has choose to get one unit of merchandise, and also want to buy other units. And according to my additional conversation with Manop on the phone, I understand that he was not paid for . . .

. . . the units that he is supposed to be paid to him. That is why Manop told me that he don't want to mail any more.

As you can see on my conversation and which was on the tape——

Mr. Perl: Your Honor, may I ask that the answer be stricken.

The Court: No, I will not strike it. You ask wide open questions.

Mr. Perl: Your Honor, my question was—may I rephrase the question. I asked——

The Court: Proceed with your answer. Go ahead.

Mr. Perl: I asked him who the guy was. That was my only question.

The Court: I heard you.

Proceed with the answer.

Mr. Perl: May we have the question read back?

The Court: Please, shut up.

Mr. Perl: Your Honor, I respect the Court, I don't mean to be disrespectful.

The Court: Well, you are being singularly disrespectful.

Mr. Perl: I don't mean to.

The Court: The jury will please step out. We will take a short recess." (H.Tr. 509-12)

When the incident is viewed within the full record and context of the trial, it is clear that the conduct of Judge MacMahon about which Head now complains, though unfortunate, was far from unprovoked by defense counsel. Certainly, this incident does not compare to other cases in this Circuit where a trial court's conduct was substantially more problematical than here and the defendant nevertheless was found to have had a fair trial. See, e.g., *United States* v. *Boatner*, 478 F.2 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973); *United States* v. *Sclafani*, 487 F.2d 245, 257 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973). Compare *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973). In any event, after the jury returned, Judge MacMahon cured any adverse effects of this minor incident:

> "The Court: I would remind the jury that your oath here is to determine the case on the evidence in the case and not on incidents like we just had. Mr. Perl, I am sure, in the head of advocacy got carried away. Perhaps I did as well. But we just cannot obviously tolerate that kind of thing in a courtroom." (H.Tr. 514)*

In light of this instruction and Judge MacMahon's further instructions to the jury at the end of the trial, it is clear

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* Moreover, the jury was properly instructed in the court's charge as to what was their function, on how to judge a witness' credibility and on accomplice testimony (H. Tr. 592-93; 597, 600-01, 623).

that Head was not so prejudiced by this incident—indeed, it is doubtful that he suffered any prejudice at all *—that he was prevented from obtaining a fair trial.**

In short, a full examination of the record clearly reveals that Judge MacMahon did "remain . . . impartial, judicious, and above all responsible for a courtroom atmosphere in which guilt or innocence [was] soberly and fairly tested." *United States* v. *Sclafani*, *supra*. See also *United States* v. *Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976); *United States* v. *Kaylor*, 491 F.2d 1127, 1130 (2d Cir. 1973); *United States* v. *Boatner*, *supra* at 740-741; *United States* v. *Pellegrino*, 470 F.2d 1205, 1206 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *United States* v. *Bernstein*, 417 F.2d 641, 644 (2d Cir. 1969).

POINT V

The Government's summation was entirely proper.

Head charges that it was highly improper and prejudicial for the prosecutor to argue in his initial summation that the $26,800 seized from Head at the time of his arrest was payment for a past shipment of heroin by Head. This contention is without merit.

The Government's summation remained within the bounds of permissible argument, being limited to presenting to the jury logical inferences from the evidence in

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* Such a notion is especially absurd in light of the overwhelming evidence of Head's guilt.

** Furthermore, Head has shown absolutely no evidence to support his conclusionary statement that Judge MacMahon was partisan and "conveyed to the jury a strong belief of the defendant's guilt."

the record. The Government properly argued that the logical reason that Head was mailing heroin to the United States was for money. The package containing $26,800 in cash was mailed to Head in Thailand by Frank L. Cherry from Washington,* whose name and address appeared in the address book seized from co-conspirator Wheaton's residence. Under the circumstances of this case—where the evidence showed the existence of a conspiracy to use the mails to transport heroin and cash payments for the heroin—it was entirely proper for the prosecutor to suggest to the jury that the package of cash was payment from a satisfied customer for heroin previously delivered by Head. The Government's statements were strictly within the bounds of permissible argument and were supported by the evidence.** See *United States* v.

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* As previously stated, Cherry was an unindicted co-conspirator.

** While Head attacks the Assistant United States Attorney for "testifying and seeking to sway the jury in a highly prejudicial manner without foundation in fact in the record", he completely ignores summation arguments made by defense counsel that lacked any foundation whatsoever in the evidence presented at trial. With respect to $26,800, for example, defense counsel argued as follows:

> "We may speculate as to anything we like, but bear in mind there is evidence in this case and that is what you are bound by. I don't know Mr. Head prior to my becoming involved in this matter. I don't know what if any other activities he may be involved in. He may have been in a crap game in New York with somebody and won a big bet. He may have been on a race in Belmont, and got paid off. He may have bet a number. I submit to you any one of those things is possible. And I again submit to you, please, before you decide with regard to that money what his role was, ask yourselves what proof is there with regard to these charges." (H.Tr. 568)

Moreover, at no time did the Assistant United States Attorney place his personal integrity behind his summation arguments. See *United States* v. *Bivona*, 487 F.2d 443 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *White*, 486

[Footnote continued on following page]

Morell, 524 F.2d 550, 557 (2d Cir. 1975); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975).

In any event, Head's claim of error in the Government's summation is foreclosed by his failure to object to the Government's summation below. See *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 238-39 (1940); *United States* v. *Martin*, 525 F.2d 703, 707 (2d Cir. 1975); *United States* v. *Marin*, 513 F.2d 974, 977 (2d Cir. 1975); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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FEDERICO E. VIRELLA, JR.,
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F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). In contrast, defense counsel in his summation argued that ". . . it is my thinking that Mr. Boonsak has not given you the clean truth, has not given you anything that we have here or that you should have in front of you in order to make an intelligent decision in this matter." Later, commenting on the quality and quantity of the evidence, he argued, ". . . You are asked to take certain circumstantial things and come to a decision based on that. And I submit to you I don't think that is enough. I don't think what you have heard is proof beyond a reasonable doubt." (H.Tr. 574-575)

★ U. S. Government Printing Office 1976— 614—350—711

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss.:

FEDERICO E. VIRELLA, JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of September 1976 he served ~~a copy~~ copies of the within attached corrected copy brief by placing the same in a properly postpaid franked envelope addressed:

Irving Perl, Esq.
60 East 42nd St.
New York, NY 10017

Arnold M. Cowan, Esq.
221 Avenue I
Redondo Beach, CA 90277

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Federico E. Virella, Jr.
FEDERICO E. VIRELLA, JR.

Sworn to before me this

23rd day of September, 1976

Mary L. Avent
MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977